UNITED
NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 615

Case No. 678: LEO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 29 June 1992, Edmund K. Leo, a staff member of the United Nations filed an application requesting the Tribunal:

"1. As a preliminary measure, to order the Respondent to produce:

...

(b) [Various memoranda and correspondence] regarding the reassignment of the Applicant.

2. Under article 9, paragraph 1 of the Tribunal's Statute:

(a) To order the Respondent to reinstate the Applicant to his post as Chief of the Energy Branch, and to rescind the Respondent's decision to reassign the Applicant...

(b) To fix an appropriate award of compensation at the sum of three years' net base pay for the injury sustained by the Applicant...

(c) To fix an appropriate award of compensation at the sum of two years' net base pay for the injury sustained by the Applicant as a result of the failure to accord him the benefits of due process in his unjustified suspension for an unreasonable period of sixteen months. ...

(d) To fix an appropriate award of compensation at the sum of two years' net base pay as well as such other relief as the Tribunal may deem appropriate, ... for the injury sustained by the Applicant as a result of the failure ... to reinstate him to his post as Chief of the Energy Branch and the negative impact ... on the Applicant's professional status and ... his career prospects.

(e) To fix an appropriate award of compensation at the sum of two years' net base pay ... for the mental suffering inflicted upon him and his family and for the unjustified delays...

(f) To fix general damages for being deprived of the opportunity of being considered for promotion to D-2...

(g) To award the Applicant the sum of seven thousand five hundred US dollars ($7,500) in legal fees and related expenses...

(h) To order the Respondent to remove all negative and prejudicial material relating to the Applicant's suspension from service from his official status file.

(i) To order and direct the Respondent to issue a formal apology in writing to the Applicant for the unfair treatment afforded him...".

Whereas the Respondent filed his answer on 30 September 1992;

Whereas the Applicant filed written observations on 2 November 1992;

Whereas, on 22 October 1993, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Board of Auditors (hereinafter referred to as "the External Auditors") who, under financial regulation 12.11, reports to the General Assembly, conducted, between 2 October and 20 November 1989, an interim audit of the operations of the Department of Technical Co-operation and Development (DTCD). In auditing the practices followed by DTCD with respect to experts and consultants, the External Auditors noted, inter alia, that "one

consultant was hired five times on a staggered period from October 1987 to July 1988... Verification of the technical report of this consultant disclosed that two of the outputs did not meet the terms of reference."

While the External Auditors were conducting their review, the Applicant submitted for clearance a further Special Service Agreement (SSA), for the same consultant (Mr. Ronald A. King) and then, cancelled the new SSA on the grounds that "the consultant is no longer available to undertake proposed assignment."

The Internal Audit Division (IAD), which conducted its own investigation, in its report dated 27 November 1989, noted "questionable actions" taken by the Applicant, e.g. that fifteen cheques totalling US$ 77,000, issued in favour of the consultant, were personally picked up by the Applicant, from the Cashier's office and nine were actually cashed by him after initial endorsements by the consultant.

On 28 November 1989, the Acting Under-Secretary-General, Department of Administration and Management, referred the matter to the Assistant Secretary-General, Office of Human Resources Management (OHRM), who suspended the Applicant with pay. The Applicant was informed of this decision on 5 December 1989. The Applicant was given a copy of the audit report and asked to provide his comments thereon. The Applicant did so on 8 December 1989.

While the investigation was taking place, IAD continued its audit of DTCD operations and discovered irregularities in the consultancy of Mr. Pawan K. Gupta, including evidence consistent with the Applicant's cashing one of the cheques payable to Mr. Gupta. This was reported to the Acting Under-Secretary-General for Administration and Management on 4 May 1990. As a result, an additional investigation was undertaken.

After the investigations had been completed, the Administration decided not to take disciplinary action against the Applicant "in view of the fact that no evidence could be found that he had financially benefitted from the transactions ... and in view

of the general lack of proper controls in DTCD over the recruitment of consultants and the evaluation of their outputs."

In a letter dated 5 February 1991, the Director, Staff Administration and Training Division, OHRM, informed the Applicant as follows:

> "...you demonstrated extremely poor judgement in initiating Special Service Agreements for consultants whose credentials have not been properly checked. You both originated and cleared two of those agreements, in disregard of proper controls. Your actions in personally picking up and endorsing many of the cheques issued to the consultants were highly irregular. There was no convincing evidence that Mr. King's work products were delivered at the end of the contract period. Serious doubts also remain as to the value to the Organization of the work products generated by the consultants, raising doubts about the propriety of your certifying satisfactory performance under the contracts and authorizing payments. However, no evidence could be found that you financially benefitted from the transactions referred to above, and consequently no disciplinary measures within the meaning of Chapter X of the Staff Rules are envisaged.
>
> As a result, the Secretary-General has decided to lift the suspension pending investigation, effective immediately. However, this decision is without prejudice to whatever administrative action the Department of Technical Co-operation for Development would take with regard to your future assignment within the Department.
>
> Pending the determination of your assignment, you will be placed on special leave with pay until 15 March 1991."

On 2 August 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 15 August 1991, the Applicant lodged a second appeal with the JAB. Later, on 30 August 1991, the Applicant notified the JAB that he intended to combine the two appeals.

The Board adopted its report on 27 March 1992. Its findings and recommendations read as follows:

"115. The Panel unanimously

(a) Finds that the Appellant was among other staff members who had been involved in the irregularities investigated in DTCD, but was the only one suspended;

(b) Finds, however, that the Appellant was not unfairly singled out during the above-mentioned investigations;

(c) Finds that the Secretary-General acted properly when he initially suspended the Appellant from duty pending investigation but that he should have lifted that suspension upon verification of affidavits from the two consultants;

(d) Finds that while there was no evidence of misconduct on the part of the Appellant, he demonstrated poor judgement, especially in endorsing some of the cheques for consultants;

(e) Finds that the Secretary-General acted within his discretionary power when he decided to transfer the Appellant to a more suitable post, but that the decision to assign him to Geneva was bad administrative practice and anyway proved to be unnecessary;

(f) Finds that, in view of the fact that the decision to suspend the Appellant after the receipt of Mr. King's affidavit, which was not challenged, was maintained, the Appellant should have been given the possibility of defending himself before a joint disciplinary committee, and that by not doing so, the Administration denied him the due process of law;

(g) Finds that the suspension from duty was much too long, especially as no disciplinary action was initiated against the Appellant;

(h) Finds that the Administration did not control properly the activities in DTCD, especially the practice pertaining to consultancies and bears therefore part of the responsibility for the repeated irregularities in that department.

116. The Panel therefore unanimously recommends

(a) That the decision to transfer the Appellant to Geneva be rescinded;

(b) That the Appellant be fairly considered for posts for which he is suitable during the current restructuring of his department;

(c) That the Appellant be awarded a token $1.00 in recognition of the responsibility incurred by the Administration in the mismanagement of consultancies by DTCD and its consequent impact on the Appellant's administrative ordeal."

On 11 May 1992, the Assistant Secretary-General for Human Resources Management informed the Applicant that the Secretary General had decided as follows:

"With respect to your appeal against your suspension from duty, the Secretary-General fully shares the Board's views that you were not unfairly singled out during the various reviews of DTCD consultancies, and that the decisions (i) to investigate the irregularities which had been identified, and (ii) to suspend you from duty were justified. He concurs with the Board's observation that you had demonstrated poor judgement in the handling of the Special Service Agreements for the consultants recruited at your request, especially in picking up and endorsing some of the cheques issued to them.

However, bearing in mind that:

(a) the decision whether to refer a case to a joint disciplinary committee is within the discretion of the Secretary-General, and depends on the facts of the case as well as on the completeness or incompleteness of the evidence;

(b) the complexities of the case as well as the number of allegations made against you required a great deal of additional investigation after the receipt of statements submitted by the consultants in December 1989 and June 1990, including the need to verify the accuracy of those statements;

(c) the nature of the allegations precluded your being returned to duty before the investigation was concluded,

the Secretary-General has concluded that the contested decision to maintain you on suspension with full pay for the duration of the investigation, without referring the matter to a joint disciplinary committee, was fully justified and did not violate your due process rights. He notes that you remained on full pay status for the entire duration of the suspension.

The Secretary-General cannot accept the Board's recommendation that you should be awarded 'a token $1.00 in recognition of the responsibility incurred by the Administration' in DTCD's shortcomings in the management of its consultancies. While he regrets those shortcomings, they do not in any way excuse your own conduct. They were, nevertheless, fully taken into consideration in the decision to conclude the matter without referring it to a joint disciplinary committee.

With respect to your re-assignment to a more suitable post after your suspension from duty had been lifted, the Secretary-General takes note of the Board's finding that, in taking that decision, he had acted within his discretionary powers. He regrets that, at the time, no post other than that which was offered to you was available for your re-assignment. He notes, however, that the situation is now different, and has decided, in accordance with the Board's recommendation, that you be fairly considered for posts for which you are suitable during the current restructuring of your Department."

On 25 June 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The length of the investigation into his case was inordinate. The Applicant's suspension with pay became a form of disciplinary action which required proceedings before the Joint Disciplinary Committee and failure to institute them was a violation of his due process rights.

2. The suspension was inappropriate since there was no probable cause to investigate him.

Whereas the Respondent's principal contention is:

The decision to investigate the Applicant's activities did not prejudice any rights of the Applicant. Suspension with pay was appropriate during such investigation and did not constitute disciplinary action requiring a hearing before the Joint Disciplinary Committee.

The Tribunal, having deliberated from 19 October to 3 November 1993, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General dated 11 May 1992, which accepted, for the most part, recommendations of the JAB adverse to the Applicant's claims, and which rejected some recommendations favorable to him. The claims arose out of a lengthy suspension with pay of the Applicant, under staff rule 110.2. The suspension extended from 5 December 1989 to 5 February 1991, during an investigation by the Administration into alleged irregularities and suspected misconduct on the part of the Applicant. The Applicant contends that the suspension was wrongful and that he was injured thereby. He claims that he should be reinstated in his post, awarded compensation, damages, costs, and that all negative and "prejudicial" material relating to his suspension should be removed from his official file. He also asks that the Respondent be directed to issue a formal apology to him. As a preliminary measure, he asks that the Respondent produce certain documents regarding his proposed reassignment to Geneva which was subsequently cancelled. The Tribunal considers that the reassignment issue is moot and therefore sees no need for the documents requested. Likewise, the Tribunal sees no need to hold oral proceedings in this case.

II. The Applicant's suspension arose out of an interim audit of the former Department of Technical Cooperation for Development (DTCD). This audit, initially, raised questions about certain Special Service Agreements (SSA) between DTCD and a consultant, and the Applicant's conduct in connection with those agreements. During the course of the audit investigation, the Internal Audit Division (IAD), in a report dated 27 November 1989, noted what it considered to be irregularities. Among these was that the Applicant had picked up fifteen cheques issued to the consultant, at the U.N. cashier's office, six, each in the amount of US$3,850 and three, each in the amount of US$7,700. These nine cheques had been signed by the Applicant, as well as by the consultant, and cashed at the Chemical Bank in the U.N. Headquarters building. The nine cheques were issued at intervals from 3 May 1988 to 7 August 1989. They appear to be in payment for all or a portion of work done under four of the five SSA's awarded to the consultant between 9 October 1987 and 26 May 1989. The other six cheques covering the remainder of the five SSA's were not signed by the Applicant. The explanation for the Applicant's endorsement signature on the reverse side of the cheques was that he was merely identifying the consultant to the bank so that it would cash the cheques. But that, without more, is not what an endorsement signature means. A signature on the back of a cheque ordinarily indicates that the signer is liable on the cheque as an endorser and guarantor of prior endorsements - often because the signer has received or shared in the payment.

III. Because of the possibility that the Applicant's role in the cashing of these cheques signified misconduct on his part, he was suspended with pay. A detailed investigation, including various matters relating to the consultants employed by the Applicant, ensued. The work performed by the consultant referred to above was scrutinized carefully. Its usefulness and quality were examined. While this investigation was going on, the IAD audit discovered apparent irregularities in connection with consulting work performed by another individual, including evidence indicating that the

Applicant might have cashed one of the cheques payable to this consultant. This was reported to the Acting Under-Secretary-General for Administration and Management on 4 May 1990, and a further investigation relating to this consultant was initiated. It appears from this investigation, inter alia, that the Applicant and the consultant stated that the former endorsed one cheque from the Organization, payable in the amount of US$6,000 at the U.N. Chemical Bank branch in February 1987, in order to satisfy the bank as to the consultant's identity so that he could cash the cheque. The Tribunal notes, in this regard, that this consultant's SSA indicated that he had a Chase Manhattan Bank account at a branch located at 422 Lexington Avenue in New York City, not far from the U.N. Headquarters building. On 29 November 1990, the investigation was concluded. The Applicant's suspension was ended on 5 February 1991.

IV. Under staff rule 110.2, the Secretary-General is entitled to exercise reasonable discretion in suspending a staff member with pay during an investigation into suspected misconduct. In the absence of improper motivation, arbitrariness, mistake of fact, denial of due process, or other extraneous factors, the Tribunal will not interfere with investigatory action by the Secretary-General. In this case, it is clear to the Tribunal that ample justification existed for the investigations that took place. For example, the Tribunal considers that the Administration had valid reason for concern, to say the least, when it found that a consultant (whose business address was in New York City) was receiving cheques from the Organization and, with the assistance of the Applicant, obtained substantial amounts of cash for them, which he carried with him instead of depositing the cheques in his own bank and obtaining there, such cash amounts as he desired.

V. The Tribunal considers that any staff member placing his or her signature as an endorsement on a cheque payable to a consultant whom the staff member has hired and with whom he had been working closely should reasonably recognize, as a matter of common sense,

that such conduct may create grave suspicions about the bona fides of the staff member. Hence, a staff member who wishes to avoid becoming embroiled in investigations such as those which took place in this case, should scrupulously refrain from any involvement in assisting in the cashing of cheques payable to consultants by the Organization. It is entirely proper for the Organization to be alert to the possibility or the appearance of kickbacks or other corrupt practices as between staff members and consultants, and to investigate fully whenever it appears that such misconduct may have occurred. That is what was done here.

VI. There is no evidence that the action taken by the Secretary-General in suspending the Applicant was improperly motivated, arbitrary or based on any extraneous motives. Nor was the Applicant denied or deprived of due process in any respect in the course of the investigations.

VII. The Applicant argues that his suspension was unreasonably prolonged. He points to a change in staff rule 110.2(a), effective from 1 January 1990, which provides that during an investigation and pending the completion of disciplinary proceedings, a suspension should not "normally" be for more than three months. In this regard, the JAB believed that the suspension should have been lifted on the basis of the affidavits from the two consultants. The Tribunal disagrees. Although staff rule 110.2(a) speaks in terms of suspensions "normally" not exceeding three months, it is plain that a suspension may be for a longer period if the nature of the investigation so requires.

VIII. Here, it took 14 months before the suspension was lifted. In the Tribunal's view, the Secretary-General acted reasonably in continuing the suspension until all of the information deemed relevant was gathered and evaluated. Given the seriousness of the issues involved and the nature of the material that had to be considered, as well as the continuation of the inquiries regarding

various items, this investigation and suspension was not unduly prolonged.

IX. The Applicant and the JAB are mistaken in believing that merely because both consultants involved in the investigation submitted exculpatory affidavits, the Respondent was compelled to end the suspension. Their affidavits were not those of disinterested bystanders. In addition, the affidavits contained no explanation of (1) why cheques were cashed instead of being deposited in the consultant's bank accounts, (2) how cheques not signed by the Applicant were processed for payment, or (3) differences, if any, in the way cheques payable to the consultants were processed for payment, i.e., deposited or cashed. Nor was there any evidence by the consultants showing what became of the large cash amounts they say were received by them. The Respondent was, therefore, not obliged to give conclusive weight to such affidavits. Contrary to the view of the JAB, the Respondent was also not required to institute disciplinary proceedings before a Joint Disciplinary Committee if he did not wish to conclude his investigation on the basis of such affidavits. It was for the Respondent, upon the conclusion of the investigation, to decide whether disciplinary proceedings should be initiated. Under staff rule 110.3(b)(iii), a suspension with full pay is not a disciplinary measure. Unless and until the Respondent decided that disciplinary proceedings would be warranted, he was not required to submit the matter to a Joint Disciplinary Committee.

X. The Tribunal finds no merit in the Applicant's contentions regarding his suspension or its duration. The Tribunal finds that the evidence fully justified the conclusion of both the JAB and the Respondent as to the Applicant's poor judgement in his handling of SSA's for consultants recruited at his request, especially in endorsing some of the cheques issued to them. In this regard, the Tribunal notes that the Applicant was on full pay throughout the entire period, and thus suffered no monetary loss. Indeed, it is

the Organization that sustained a loss by paying the Applicant's salary while he rendered no service. To avoid these unfortunate consequences, the Administration should conduct its investigations as expeditiously as possible.

XI. The Applicant's contentions as to the failure to reinstate him in his former post, the alleged negative impact of the investigation on his reputation, his alleged mental suffering, the allegedly unjustified delays, and his being deprived of the opportunity to be considered for promotion to the D-2 level because of his suspension are likewise without merit. The non-reinstatement of the Applicant in his former post was evidently related to a reorganization. The Tribunal has no basis for finding that this entailed any unlawful conduct on the part of the Administration. The Respondent's decision of 11 May 1992, stated that the Applicant would be fairly considered for posts for which he is suitable "during the current restructuring of his department." Nothing to the contrary is before the Tribunal. This point was obviously not considered by the JAB. If there has been any negative impact on the Applicant's reputation or if he, or his family, underwent any mental suffering, that is not the fault of the Organization. Rather, it stems from the Applicant's poor judgement in engaging in activities which he should have recognized could easily raise suspicions of serious misconduct. The Applicant has no basis for claiming the loss of any possible opportunities of promotion to the D-2 level because he was on suspension. A staff member whose conduct was the subject of a wholly justified investigation like the one conducted in this case, bears the risk of such consequences.

XII. The Tribunal sees no justification for the Applicant's request that the Respondent issue an apology. Nor does the Tribunal consider that there is any valid basis for the Applicant's request that the records relating to this matter in the Applicant's official status file should be removed.

XIII. For the reasons set forth above, the application is rejected, as is the request for costs.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 3 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary